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In The

Supreme Court of The United States

OCTOBER TERM, 1973

No. 73-1969

WILLIAM WINKLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

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ATTORNEYS FOR PETITIONER

JUNE 28, 1974

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In The

Supreme Court of The United States

OCTOBER TERM, 1973

WILLIAM WINKLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Petition for a Writ of Certiorari
To the Court of Criminal Appeals of Texas

William Winkle, petitioner before this Court, appellant before the Court of Criminal Appeals of Texas, Nos. 47,393 and 47,394, and defendant in cause numbers C72-3789-I and C72-3788-I in Criminal District Court No. 2, Dallas County, Texas, respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Criminal Appeals of Texas, which affirmed petitioner's conviction for rape.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas (Appendix A, R. 535-543)[1] is reported at 506 S.W.2d 891 (Tex. Cr. App. 1974).

JURISDICTION

The opinion of the Court of Criminal Appeals of Texas was delivered on March 13, 1974. A Motion for Leave to File a Motion for Rehearing, timely filed, was denied on April 3, 1974, and on April 5, 1974, (R. 614-626) the mandate issued. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED

1. Is a search warrant that describes the "things to be seized" as implements of the offense of Rape in violation of the Fourth Amendment to the United States Constitution?

2. May a constitutionally defective warrant, which does not particularly describe the things to be seized, be cured by the officer's affidavit, even though the affidavit was not physically attached to the warrant and the warrant did not incorporate the affidavit by reference?

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[1]Uniform pagination appears at the lower right hand corner of each page in the certified record that is before this Court.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The U.S. CONST. AMEND. IV provides in pertinent part as follows:

> "* * * no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*" (emphasis added)

The U.S. CONST. AMEND. IV provides in pertinent part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

TEX. CONST. art. 1 §9 provides in pertinent part as follows:

> "* * * no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, * * *"

The TEX. CODE OF CRIM. PROC. ANN. ART. 18.13(3) provides in pertinent part as follows:

> "That it describe, as near as may be, * * * the implements alleged to be there kept for the purpose of aiding in the commission of offenses, * * *"

STATEMENT OF THE CASE

The petitioner was indicted and tried before a jury in two cases arising out of the same transaction for the crime of rape (R. 4).[2] The jury found petitioner

[2]TEX. PENAL CODE ANN. Art. 1183 *et seq.* (1961).

guilty and set punishment at life (R. 44,50,52). Both cases were affirmed by the Court of Criminal Appeals of Texas (Appendix A, R. 535-543).

The testimony of the complainants (R. 63-224) was not corroborated. The examining physician testified that he found no trauma indicating intercourse (R. 314). The opinion below acknowledged that the complainants' outcry was delayed by several hours and the complainants lied concerning their whereabouts on the night in question (R. 138,142,537). The only evidence that tended to support the complainants' testimony was the introduction into evidence of two knives (States Exhibits one and two, R. 271) that were allegedly used to frighten the complainants.

The knives were seized in a search of petitioner's home in absence of petitioner pursuant to a search warrant (R. 477). The warrant was obtained from a local magistrate after presentation of a sworn affidavit (R. 476). The warrant described the things to be seized as "implements* * * for the purpose of aiding in the commission of the offense of Rape." (R. 477). The affidavit was not attached to the warrant and the warrant did not incorporate the affidavit by reference. The same officer that prepared and presented the affidavit executed the warrant within thirty minutes after the warrant was issued by the magistrate (R. 245,249).

How the Federal Question was Raised and Passed Upon

Prior to the trial petitioner filed a motion to suppress (R. 18) requesting a hearing outside the presence of the jury on the admissibility of any evidence obtained as the result of a search of petitioner's house. During the trial, a hearing was held on the motion outside the presence of the jury (R. 244-259). At this hearing Detective Cranford testified that he searched petitioner's residence pursuant to a search warrant that was issued by a magistrate (R. 245-251). Petitioner offered for the record only the affidavit and search warrant (State's Exhibits three and four, R. 248). Petitioner made strenuous objection to the search warrant's failure to particularly describe the things to be seized in violation of the Fourth Amendment (R. 251-259, 270-271). The objection to the evidence was overruled (R. 256).

Subsequently petitioner was convicted and appealed to the Court of Criminal Appeals of Texas. By briefs and oral argument petitioner raised the questions herein presented (R. 547-550).

The lower court's opinion discussed petitioner's contention involving the search warrant but made no reference to the Fourth or Fourteenth Amendments to the United States Constitution. The opinion below justified the action of the trial court on the basis that the officer who filed the affidavit executed the warrant within thirty minutes. In addition the opinion below stated that the executing officer was

"armed with the warrant *and affidavit*" when the search was made (R. 538). *This fact does not appear in the record.*

Thereafter petitioner filed a motion for rehearing which attacked the portion of the opinion below dealing with the search warrant (R. 615-621). Petitioner's motion was denied on April 3, 1974.

REASONS FOR GRANTING THE WRIT

The questions presented in this case are of great importance and deserve the attention of this Court for the following reasons:

1. The opinion below authorizes the use of a general warrant that does not particularly describe the "things to be seized";

2. The opinion below, if it is allowed to stand, destroys the judicial function of a neutral magistrate in the issuance of search warrants; and

3. The decisions of the lower courts are in conflict as to the extent, if any, to which an officer's affidavit may cure a general warrant.

These reasons will be presented in separate sections below.

I.

The opinion below authorizes the use of a general warrant that did not particularly describe the "things to be seized".

The search warrant in question (R. 477) described the things to be seized in the following manner:

> "* * * a place where implements are kept for the purpose of aiding in the commission of an of-

> fense as defined by the Penal Code of the State of Texas, to-wit: Rape.
>
> You are therefore commanded to forthwith search the place above named and described where implements, such as are above named, are kept for the purpose of aiding in the commission of the offense of Rape * * *."

The court below admitted that the description of the "things to be seized" was defective, but held that the officer's affidavit sufficiently described the implements as "two knives". The affidavit, however, was not attached to the warrant nor was it incorporated by reference in the warrant. The lower court attempted to justify its holding by the fact that the same officer who obtained the warrant executed it within thirty minutes after its issuance (R. 538). In addition the lower court stated that the knives were found exactly where the affidavit had described. Finally, the lower court placed importance on the alleged fact that the executing officer had a copy of the affidavit in his possession at the time of execution. The latter does not appear in the record at any point.

The general warrant was condemned as early as 1765 in the decision of *Entick v. Carrington*, 19 How.St.Tr. 1029 at 1073-1076. The decisions of this Court also condemn the general warrant by requiring that "the things to be seized" must be particularly described on the search warrant itself. In *Marron v. United States*, 275 U.S. 192, 196 (1927) this Court held that general search warrants are fundamental violations of the Fourth Amendment and that "as what is

to be taken, nothing is left to the discretion of the officer executing the warrant." *Boyd v. United States,* 116 U.S. 616, 624 (1886).

In *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 209 (1946) this Court held that the term "particularly describing the things to be seized is 'literally applicable to warrants'." *See Go Bart Importing Co., et al v. United States,* 282 U.S. 344 (1931).

In this Court's recent decision of *Coolidge v. New Hampshire,* 403 U.S. 443, 471 (1971) it is stated:

> "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'warrants * * * particularly describing * * * [the] things to be seized'."

See Mr. Justice Black's concurring opinion in *Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri,* 367 U.S. 717, 738 (1961). See also *Stanford v. Texas,* 379 U.S. 476, 481-485 (1965); and *Berger v. State of New York,* 388 U.S. 41, 53 (1967).

In addition it is settled that neither the fruits of the search nor the manner in which the search is conducted will cure a constitutionally defective warrant, *Byars v. United States,* 273 U.S. 28, 29 (1927) and *United States v. Marti,* 421 F.2d 1263, 1267-1268 (2nd Cir. 1970). *See also Gouled v. United States,* 255 U.S. 298 (1921).

II.

The opinion below, if it is allowed to stand, destroys the judicial function of a neutral magistrate in the issuance of a search warrant.

This Court requires a neutral magistrate to determine that probable cause exists based on an officer's affidavit before the magistrate issues a search warrant. *See McDonald v. United States,* 335 U.S. 451, 455-456 (1948); *Aguilar v. Texas,* 378 U.S. 108 (1964); and *Spinelli v. United States,* 393 U.S. 410 (1969). Once the determination of probable cause is made the magistrate may limit the scope of the search, *United States v. Marti,* 421 F.2d 1263, 1268 (2nd Cir. 1970). When the magistrate issues a warrant it is an order of the court and it must stand on its own terms. If, however, a constitutionally defective search warrant (court order) may be cured by the affidavit, then the safeguard of a neutral magistrate between the police and society is effectively removed. *Beck v. Ohio,* 379 U.S. 89 (1964). *See Coolidge v. New Hampshire, supra.*

III.

The decisions of the lower courts are in conflict as to the extent, if any, to which an officer's affidavit may cure a general warrant.

The lower courts are divided on this issue as follows: (1) The affidavit may not be considered because

the Fourth Amendment requires that the warrant particularly describe the things to be seized: (2) The affidavit may be considered only if it is incorporated by reference and physically attached to the warrant; or (3) The affidavit may be referred to in construing a search warrant without incorporation or physical attachment.

The cases in the first category hold that there is a fundamental difference between the warrant and the affidavit, that the affidavit is merely evidence presented to the magistrate, and that the affidavit can not be constitutionally used to limit the scope of or cure a defective warrant. The best examples of these cases are *New Jersey v. Muldowney,* 60 N.J. 594, 292 A.2d 26, 28 (1972);[3] *United States v. Kaye,* 432 F.2d 647 (D.C. Cir. 1970); *United States v. Marti, supra; Lowrey v. United States,* 161 F.2d 30 (8th Cir. 1947) *cert. denied* 331 U.S. 849 (1947); *Malone v. State,* 147 Tex.Crim. 433, 181 S.W.2d 281 (1944); *United States v. Wroblewski,* 105 F.2d 444 (7th Cir. 1939).

The cases in the second category hold that the affidavit may be used to limit the scope or cure a defective search warrant only if the affidavit is physically attached to the warrant and the search warrant incorporates the affidavit expressly with suitable words. The best cases in this category are *Bloom v. Florida,* 283 So.2d 134, 135-136 (Fla.Dist.Ct.App.

[3]The warrant in this case is almost identical to the warrant in the case at bar in that the warrant in this case directs the executing officer to seize property used in the commission of the crime of obscenity.

1973); *Moore v. United States,* 461 F.2d 1236, 1237-1238 (D.C.Cir. 1972); *Phenix v. State,* 488 S.W.2d 759, 764 (Tex.Cr.App. 1972); *Frey v. State,* 237 A.2d 774 (Md.Ct.Spec.App. 1968); *Ellison v. State,* 212 S.W.2d 387 (Tenn.App. 1948); *Miller v. State* 134 Tex.Crim.118, 114 S.W.2d 244 (1938).

In the last category are opinions that hold that the officer's affidavit may be used without any specific requirement of incorporation by reference or physical attachment to supplement the search warrant. Some of these cases are *Commonwealth v. Todisco,* 294 N.E.2d 860 (Mass. 1973); *United States v. Gomez,* 42 F.R.D. 347 (S.D.N.Y. 1967); *United States v. Sklaroff,* 323 F.Supp. 296 (S.D.Fla. 1971); and *Fry v. United States,* 9 F.2d 38 (9th Cir. 1925).

CONCLUSION

For the reasons that the opinion below is in direct conflict with the Fourth Amendment to the Constitution of the United States; that the effect of the opinion below is to remove the magistrates' power to limit the scope of search warrants; and that the lower courts are divided as to the use of affidavits to cure general warrants this petition for writ of certiorari should be granted on both questions presented.

Respectfully submitted,

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APPENDIX A

THE OPINION BELOW

William WINKLE, Appellant,
v.
The STATE of Texas, Appellee.
Nos. 47393, 47394.
Court of Criminal Appeals of Texas.
March 13, 1974.
Rehearing Denied April 3, 1974.

OPINION

ONION, Presiding Judge.

These appeals are from convictions for rape, in a single trial, wherein the punishment was assessed by the jury at life in each case.

[1, 2] At the outset we shall consider appellant's complaint that he was arraigned in both cases in the presence of the jury. This court has repeatedly stated that the practice of conducting arraignment in the presence of the jury should not be condoned, and trial courts should be careful to avoid such practice. Minafee v. State, 482 S.W.2d 273, 276 (Tex.Cr.App.1972); Stewart v. State, 473 S.W.2d 495, 496-497 (Tex.Cr.App.1971); Thompson v. State, 447 S.W.2d 920, 922 (Tex.Cr.App.1969). In the instant case, however, as in Stewart, there was no objection to the arraignments being conducted in the jury's presence and we find no reversible error.

Next, appellant challenges the sufficiency of the evidence to sustain the convictions.

On the evening of March 18, 1972, the 18-year old prosecutrixes, A__ and V__, were driving to a miniature golf course in Dallas after being denied admittance at Lou Ann's because they were unescorted when a car driven by Jack Gamble and containing the appellant and Joe Gamble pulled alongside and motioned for them to stop. The girls complied with the request of the unknown trio and, after a short conversation, the girls were invited to a party and agreed to go. The appellant and Joe Gamble got into V__'s car and gave directions to Joe Gamble's house, while Jack Gamble left in the other car to pick up his date.

The group drove to a house located in the Pleasant Grove area of Dallas County and upon entering, began to listen to music, strum the guitar and play with some puppies. Later, Jack Gamble arrived with his date, changed his shirt and announced he and his date were not staying. At this point A__ and V__ decided to leave, but discovered that V__'s car would not start. The appellant and Joe Gamble worked on the car, but were not successful and the girls were persuaded to come back into the house and let the motor "cool." After some discussion about calling a mechanic, the appellant and Joe Gamble drew butcher knives, pushed the girls into a bedroom and ordered them to undress. The appellant and Gamble then had numerous acts of sexual intercourse with each girl,

performed rectal sodomy on the girls and forced them to perform acts of oral sodomy, and then forced the girls to commit oral sodomy upon each other. These acts took place over a three or four hour period.

After the girls had been allowed to dress, Jack Gamble returned from his date and V__ related she told him what had transpired. Subsequently, one of the men repaired V__'s automobile and the girls were permitted to leave after being threatened they would be killed if they told what had happened and after they promised to remain silent.

About 5 a.m. the girls arrived at A__'s home in Mesquite and told A__'s mother they had been at the house of V__'s sister, but came home because the people at the sister's house had been called out of town. Upon awakening at 8:30 a.m., the girls related to A__'s mother they had been raped. The police were called. They pointed out the house in question to the police and were taken to the hospital for an examination.

The appellant did not testify, but called Jack Gamble, who testified that he returned to the house after 3 a.m. and found the girls fully clothed and that, after a short discussion with V__, she went with him to the living room, where he pulled out a hideaway bed, laid on it with V__, kissing and was "starting to make out" when A__ came in and said she and V__ had to leave.

[3] Dr. Robert Gardner, a defense witness, testified that he examined both girls and found no signs of trauma, bleeding, nor observed any anal irritation in either girl. He related he failed to find any evidence of sperm in their vaginas. The girls had testified that neither man had reached a climax during the numerous sex acts.

In rebuttal A__'s mother testified the doctor had told her he had found evidence of sexual intercourse.

It is appellant's contention that since the prosecutrixes' stories were severaly impeached by the examining physician, and other facts, their testimony is not worthy of belief.

The prosecutrixes repeatedly testified that appellant had penetrated their private parts with his male organ. They were in the same room and corroborated each other's testimony. Although the examining physician expressed an opinion inconsistent with that of forcible rape, the jury was at liberty to believe any part of the testimony and reject the remainder.

It is true that the girls did not make an immediate outcry upon return to A__'s home, but they explained they were scared because of the threats upon their lives and were not sure what to do, and delayed their outcry for several hours.

The jury observed the witnesses, passed on their credibility, and chose to believe the girls' explanation, and this court should not disturb the verdict where the same is based on probative evidence. 48

Tex.Jur.2d, Rape, Sec. 77, p. 426; Blackmon v. State, 87 Tex.Cr.R. 173, 220 S.W. 93 (1920); Barry v. State, 165 Tex.Cr.R. 204, 305 S.W.2d 580 (1957).

Viewing the evidence in the light most favorable to the jury's verdict, as we are required to do, we deem it sufficient to sustain the convictions.

Next, appellant contends the trial court erred in permitting two butcher knives to be introduced into evidence, as they were seized under a defective search warrant.

The record reflects that Dallas Police Officer Jack Cranford talked to the prosecutrixes and learned that the butcher knives used had been placed in a dresser drawer in the bedroom where the offenses took place. Thereafter he filed a search warrant affidavit seeking a warrant to search for implements kept for the purpose of aiding in the commisison of an offense, to-wit: rape and described such implements as "knives." The search warrant was issued and the affiant-officer and others went to the house in question and searched the dresser drawer and found the butcher knives which were introduced, over objection, into evidence.

Appellant contends that the search warrant is defective because it does not describe the implements to be searched for as "knives." The warrant authorized the officers to search the place described "where implements, *such as are above named,* are kept for the purpose of aiding in the commission of the of-

fense of Rape and if you find there any such implements, you will seize the same ...." Appellant argues that implements were not "above named" or described and the warrant did not comply with the provisions of Article 18.13(3), Vernon's Ann.C.C.P., which provides, among other requisites of a search warrant,

> "That it describe, as near as may be, the property supposed to be commonly concealed in such suspected place, or the implements alleged to be there kept for the purpose of aiding in the commission of offenses, and state the particular offense for which such implements are designed."

In the instant case the record reflects that within 30 minutes after the affiant-officer Cranford had obtained a search warrant he searched the house in question for the knives, finding the same exactly where they were described as being. There was no general or exploratory search for any other type of implements.

[4, 5] It is clear that Article 18.13(3), supra, was designed to inform the officers executing a warrant what implements to search for. In the instant case the officer who had made the affidavit, armed with the warrant and affidavit which described the implements as "knives," made the search. While the search warrant should have described the implements, we perceive no reversible error under the circumstances. Cf. Phenix v. State, 488 S.W.2d 759

(Tex.Cr.App.1972); Johnson v. State, 469 S.W.2d 581 (Tex.Cr.App.1971).

Further, it is observed that, prior to introduction of the knives into evidence, both prosecutrixes testified, without objection, that the knives appeared to be the same ones used by the appellant and Joe Gamble.

The ground of error is overruled.

[6] Appellant also complains of the trial court's action in permitting the prosecutor to inquire of Jack Gamble, a defense witness, about extraneous offenses committed by the appellant.

On cross-examination Gamble was asked that if the appellant had told the girls "he had been up for rape before," would it be a true statement. A number of objections ensued and were overruled. Finally, the witness admitted that of his own personal knowledge he knew that appellant had been convicted of rape.

When the first question was asked, appellant's objection was that it was "highly prejudicial." At no time was the trial court's attention directed to the complaint now raised on appeal that the prosecutor was improperly seeking to elicit evidence of extraneous offenses. While the questions were improper under the circumstances, appellant's general objection was not sufficient to preserve the matter for review.

[7] Appellant also complains that Gamble was also asked if "the other girls that he (the appellant) has

raped, he has never had a climax?" The objection "that is an assumption of fact" was sustained and appellant failed to pursue his request for a jury instruction to disregard until he obtained a ruling. Nothing is presented for review. See Hicks v. State, 493 S.W.2d 833 (Tex.Cr.App.1973).

[8] Appellant also complains of questions directed to Gamble inquiring if he had seen appellant with a girl named C_ A_ S_, who had a five months old baby and a woman named W_ B_ H_. The witness denied both instances before a general objection was interposed. Nothing is presented for review.

Next, appellant complains of the trial court's failure to respond to the following written objection to the charge at the guilt stage of the trial:

> "That the trial court *has* in its charge has failed to properly limit certain evidence dealing with another conviction for this defendant and the facts and circumstances surrounding such alleged offense."

[9] The written objection fails to clearly point out just what testimony it had reference thereto and what type of limitation was desired. Apparently it has reference to a prior rape conviction, but it is here noted that the prosecutrixes testified that the appellant had threatend them, told them he had been convicted and was on probation for rape, and further that he had raped another girl whom he had killed. This testimony was clearly admissible and not sub-

ject to any type of limiting charge.[1] In his appellate brief appellant contends the written objection to the charge was addressed to the testimony of Jack Gamble above described, and argues that such testimony of an extraneous offense or offenses should have been limited to the issues of intent, identity, or for whatever reason it was admitted, not surrendering his contention that the same was not admissible in the first place. As noted earlier, the elicitation of the testimony from Jack Gamble concerning the prior conviction was improper, but the appellant did not properly preserve his error.

[10] Under the circumstances, we cannot agree the court failed to respond to the written objection to the court's charge and limit the testimony to some issue for which it was not admitted or admissible. No error is presented. See Article 36.19, Vernon's Ann.C.C.P.

Appellant's next complaint relates to statements made by the prosecutor during the argument, which, according to appellant, commented on his failure to testify.

One such incident occurred and involved the following colloquy:

"MR OVARD: Now think about the girls for a moment. Think what you have to go through when you are a victim of a rape case. I really don't blame the girl, or a woman that doesn't go through

[1]Welch v. State, 373 S.W.2d 497, 500 (Tex.Cr.App.1964).

with it, because here's what you have to do, and you heard it from the stand. First, you have got to go to the Police, and you go before an experienced investigator who talks to you. He makes a determination because in this case he talked to both the girls, he talked to this Defendant, he talked to the other Defendant before he filed the case of rape. That's the first thing they have to do."

Such argument was objected to on the ground that the prosecutor was commenting on appellant's failure to take the stand.

Article 38.08, Vernon's Ann.C.C.P., prohibits allusion to or comment upon the failure of an accused to testify in his own behalf. See Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

[11] As stated in Yates v. State, 488 S.W.2d 463 (Tex.Cr.App.1972), for there to be reversible error because of a comment on the failure of the accused to testify, the language used must be looked to from the standpoint of the jury, and the implication that the language used had reference to an accused's failure to testify must be a necessary one. Further, it is not sufficient that the language might be construed as an implied or indirect allusion thereto. See Lipscomb v. State, 467 S.W. 2d 417 (Tex.Cr.App.1971); Ramos v. State, 419 S.W.2d 359 (Tex.Cr.App.1967).

[12] The prosecutor's argument, when taken in the context in which it was made, does not reflect that it was a comment upon the appellant's failure to testify.

Appellant's contention is without merit.

Lastly, we shall consider appellant's contention that the court erred in overruling his objection to the prosecutor's comment on the failure to call the co-defendant Joe Gamble.

The argument complained of is as follows:

"... there were only four people out there in that bedroom, those two girls who we brought down to testify before you, this Defendant, who sits here and his friend, Gamble, who (sic) you didn't get to hear testify. I wonder why?"

The objection that it was an improper comment was overruled. Over further objection the prosecutor pointed out Gamble was a friend of the appellant and a principal.

[13] We start with the observation that the prosecution has the right to comment on the accused's failure to call competent and material witnesses. Miller v. State, 458 S.W.2d 680, 683 (Tex.Cr.App.1970) and cases there cited. See also Batiste v. State, 462 S.W.2d 30 (Tex.Cr.App.1971); Joines v. State, 482 S.W.2d 205 (Tex.Cr.App.1972); Rodgers v. State, 486 S.W.2d 794 (Tex.Cr.App.1972).

[14] A co-defendant is now a competent witness for either the State or the accused. See Article 36.09, Vernon's Ann.C.C.P. See also Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Overton v. State, 419 S.W.2d 371 (Tex.Cr.App.1967); Ex parte

Pennington, 471 S.W.2d 578 (Tex.Cr.App.1971) and cases there cited.

[15] Formerly, a prosecutor's comment in jury argument on a defendant's failure to call a co-defendant as a witness was reversible error since the former statutes (Article 711, Vernon's Ann.C.C.P.1925, and Article 82, Vernon's Ann.P.C.) rendered the co-defedant incompetent as a witness. See, i.e., Landers v. State, 63 S.W. 557 (Tex.Cr.App.1901); Ramirez v. State, 112 Tex.Cr.R. 332, 16 S.W.2d 814 (Tex.Cr.App.1929); Grille v. State, 112 Tex.Cr.R. 561, 17 S.W.2d 833 (1929); Clayton v. State, 139 Tex.Cr.R. 86, 138 S.W.2d 1084 (1940). Those statutes are no longer viable in light of the 1965 Code of Criminal Procedure and the decision in Washington v. Texas, supra.

Appellant's contention is overruled.

Finding no reversible error, the judgments are affirmed.

ODOM, J., concurs in this result.